

Otsus, mis käsitleb, kuidas Euroopa Komisjon jälgib ja tagab põhiõiguste austamist Horvaatia ametiasutuste poolt ELi vahenditest toetatavate piirihaldusoperatsioonide kontekstis (juhtum 1598/2020/VS)

Otsus

Juhtum 1598/2020/VS - Alguskuupäev: {0} 06/11/2020 - Otsuse kuupäev: {0} 22/02/2022 - Asjassepuutuvad institutsioonid Euroopa Komisjon (Edasine uurimine ei ole põhjendatud) |

Juhtum käsitles, kuidas Euroopa Komisjon jälgib ja tagab põhiõiguste austamist Horvaatia ametiasutuste poolt ELi vahenditest toetatavate piirihaldusoperatsioonide kontekstis. Uurimisel kontrolliti, kas komisjoni võetud kohustuse kohaselt kaasnes Horvaatiale antud liidu finantsabiga järelevalvemehhanismi loomine, et tagada, et piirihaldusmeetmed vastavad täielikult põhiõigustele ja ELi varjupaigaõigusele.

Ombudsman leidis, et komisjon tekitas segadust sellega, kuidas teatas liidu finantsabi kontekstis järelevalvemehhanismist. Peale selle, kuigi piirikontrolli tegevust on rahastatud alates 2018. aastast, loodi põhiõiguste kaitse ülevaate tegemise sõltumatu järelevalvemehhanism alles 2021. aasta suvel. See oli kahetsusväärne.

Uurimist lõpetades kutsus ombudsman komisjoni tungivalt üles jälgima, kas mehhanism on põhiõiguste ja ELi õiguse järgimise tagamisel tõepoolest ka sõltumatu ja tõhus. Ombudsman tegi ettepaneku täiustada komisjoni antavat teavet järelevalvemehhanismi kontekstis. Samuti kutsus ombudsman komisjoni üles tegutsema järelevalvemehhanismi kontekstis aktiivselt ning nõudma Horvaatia ametiasutustelt konkreetse ja kontrollitava teabe esitamist meetmete kohta, mida on võetud rändajate ja varjupaigataotlejate kollektiivse väljasaatmise ning väärkohtlemise aruannete uurimisel. Samuti palus ombudsman komisjonil talle aasta pärast teatada, mis meetmeid on komisjon võtnud, et tugevdada ELi rahastatavatel piirioperatsioonidel põhiõigustele vastavust.

Background to the complaint

1. Since 2018, the European Commission has been providing emergency assistance to Croatia to support border control activities, due to increased migratory pressure. [1] The grants were awarded under the Internal Security Fund - Borders and Visa and the Instrument for Financial



Support for External Borders [2] to the Croatian Ministry of Interior to carry out the projects, whose terms were set out in the corresponding grant agreements. At the time, the Commission stated publicly that the emergency funding would be accompanied by a “monitoring mechanism”. [3]

2. In the same period, human rights institutions and other organisations, reported instances of collective expulsions and forcible deportations at the Croatian border, as well as denial of access to asylum procedures and violence, abuse or ill-treatment of people attempting to cross into Croatia. [4]

3. On 20 September 2020, the European Ombudsman received a complaint from Amnesty International against the Commission. It raised concerns that the Commission had failed to address persistent allegations of serious human rights abuses by the Croatian authorities in the context of border management operations, for which Croatia received EU funds.

The inquiry

4. The Ombudsman opened an inquiry to see whether a monitoring mechanism had been set up, and to examine the Commission’s role in overseeing this.

5. In the course of the inquiry, the Ombudsman received the reply [5] of the Commission on the complaint and on additional questions that she had asked. [6] Subsequently, the Ombudsman received the comments of the complainant on the Commission’s reply. The Ombudsman also sought information from the Croatian Ombudsman’s Office. The Ombudsman’s inquiry team also met with representatives of the Commission. [7]

Arguments presented to the Ombudsman

The complainant’s arguments

6. The complainant was concerned that the Commission had failed to ensure that the EU funds allocated to Croatia for border management were spent in compliance with fundamental rights standards and EU law. In December 2018, the Commission stated [8] that a monitoring mechanism would be put in place to ensure that all measures applied at the EU’s external borders are proportionate and in full compliance with fundamental rights and EU asylum law. However, there was no evidence that such a mechanism had been established. Instead, funds originally earmarked for this purpose were first reduced and then spent by the Croatian authorities on other activities, including training programmes and conferences.

7. According to the complainant, there was also lack of transparency in how the Commission communicated about the matter.

8. In the complainant’s view, on numerous occasions, the Commission publicly conflated the *monitoring activities* [9] conducted by the UN High Commissioner for Refugees and the Croatian Law Centre [10] with the *monitoring mechanism* envisaged under the EU grants. The



complainant further considers that, during the Ombudsman's inquiry, the Commission did not convincingly demonstrate that it took steps to ensure that EU emergency funds assistance to Croatia did not contribute to human rights violations.

9. The complainant noted that a monitoring mechanism was put in place in the summer of 2021, and acknowledged the Commission's actions to this end. However, it claimed that this falls short of the mechanism required under the grant agreements. The complainant further argued that the monitoring mechanism is not sufficiently independent, nor is it sufficiently effective at ensuring that the Croatian border control measures are proportionate and in full compliance with fundamental rights and EU law. Human rights violations on Croatian borders continue unabated, the complainant said, while the country continues to receive considerable EU funding for border management activities.

The Commission's arguments

10. The Commission stated that border management projects supported under the 2017 and 2018 emergency assistance grants included a *technical monitoring* component, for which the grant agreements foresaw initial allocations of EUR 300 000 and EUR 94 751 respectively. According to the Commission, this included monitoring border police activities, developing standard operating procedures for these activities, specialised training and awareness raising for border police officers, among other things. This component mentioned 'independent controls' by the UNHCR and the Croatian Law Centre and 'controls' by the Border Police Directorate/Ministry of Interior. The grants did not foresee the establishment of an independent monitoring mechanism.

11. The project under the first emergency and assistance grant ended on 30 November 2019. Only part of the funds allocated to technical monitoring activities were used. The 'final implementation report' did not provide information on whether an independent monitoring mechanism was set up or became operational, as this was not covered by the grant agreement.

12. In the Commission's view, setting up an independent and effective monitoring mechanism is the responsibility of the Croatian authorities. The Commission is offering support to this end.

13. The Commission clarified that there were two separate monitoring mechanisms in Croatia: (i) the Tripartite Protocol (referred to above) and (ii) the mechanism foreseen under the emergency assistance grant agreements, which was meant to provide technical support to the Croatian authorities, enabling them to monitor border control activities. The first mechanism does not receive EU funds. The emergency assistance grant was used for a number of seminars, procedures and trainings. In the Commission's view certain progress was achieved as a result of the grant. According to the Commission, the two mechanisms ran in parallel and were not connected.

14. The Commission has neither the authority nor the personnel to investigate human rights violations in Member States on its own. Due to increasing criticism in relation to the effectiveness of the Tripartite Protocol and reports of fundamental rights breaches, as of 2020, the Commission increased its engagement with the Croatian authorities in order to encourage them to put in place an *independent* monitoring mechanism. It both cooperated with the



Croatian authorities on the practical aspects of establishing a mechanism and has been constantly requesting further measures to be taken by the Croatian authorities to enhance the effectiveness of fundamental rights monitoring.

15. As the initial grant agreements did not contain specific requirements that the use of funds should be compliant with fundamental rights (so called 'conditionality'), the Commission did not have the legal means to suspend and recall funds in the light of alleged violations of fundamental rights. While the Commission very rarely uses conditionality in relation to emergency funding, the revelations about the situation in Croatia prompted the Commission to include, in the most recent grant agreement concluded with Croatia in 2021, conditionality provisions. In particular, Croatia was required to set up an independent mechanism to monitor compliance with fundamental rights.

16. The Croatian authorities established such a mechanism in June 2021. Civil society organisations, the Croatian Ombudsman, international organisations, the EU's Fundamental Rights Agency and the Commission are all expected to provide advice on the operation of the mechanism. The mechanism will be supported through the emergency assistance funds for one year (until May 2022). It will evolve in the future and the Commission indicated that it is willing to offer support to the Croatian authorities to improve the mechanism if necessary.

17. The Commission intends to assess how future EU funding can include conditionality on fundamental rights compliance. The Commission also indicated that the Schengen Evaluation and Monitoring Mechanism [11] could be updated to include the evaluation of Member States' capacity to ensure the protection of fundamental rights.

The Ombudsman's assessment

18. The relevant EU legislation [12], on which the emergency assistance grants to Croatia are based, stipulates that any activities funded by the Instrument for Financial Support for External Borders must respect fundamental rights and comply with the provisions of the Charter of Fundamental Rights, amongst other obligations [13]. While the Commission does not have the authority or means to investigate or directly monitor border activities itself, it has the authority and an obligation to ensure that EU funds granted to a Member State are spent in compliance with fundamental rights and EU law, and to insist on safeguards to this end.

19. The Ombudsman has previously found [14] that the Commission is obliged to respect the Charter in its entirety, in all its activities, including in the distribution and monitoring of EU funds, and that the Commission should ensure EU funds do not support actions that are not in line with EU values, notably the rights, freedoms and principles recognised by the Charter.

20. The initial grants for border management activities in Croatia were disbursed at the same time as there was mounting reliable information from national and international human rights institutions and organisations about the mistreatment of migrants and other human rights concerns at Croatian borders. Against this background, disbursing the funds without ensuring



sufficient fundamental rights safeguards were in place was regrettable. The emergency nature of the EU funding does not mean the Commission should not have ensured that the funds were spent in compliance with fundamental rights.

21. Since the most recent grant agreement provides for conditionality, and expressly required a monitoring mechanism to be established, the Ombudsman does not consider it necessary to make a recommendation to this end. The Ombudsman expects, however, that the Commission will take an active role and demand concrete and verifiable information from the Croatian authorities on the steps taken to investigate reports of collective expulsions and mistreatment of migrants and asylum seekers. She makes a corresponding suggestion below.

22. The 2017 and 2018 emergency assistance grant agreements did not envisage the establishment of an independent mechanism monitoring compliance with fundamental rights at the borders. [15] However, they included a component [16] covering the ‘technical monitoring’ of activities carried out by the border police, the review of procedures, operational arrangements and manuals, training and support of relevant staff in the national authorities for dealing with complaints and reported incidents.

23. In contrast, the latest emergency assistance grant in 2021 expressly provided funds for an independent monitoring mechanism (to be established for a period of one year with a possibility for extension). The creation of the mechanism was also a condition for the disbursement of the grant funds. This constitutes a significant improvement.

24. The monitoring carried out prior to 2021 by the Tripartite Protocol [17] was funded by the UNHCR, and not through EU funds. In documents on the implementation of the grants, which were inspected by the Ombudsman inquiry team, the activities under the Tripartite Protocol are referred to as a ‘monitoring mechanism’. In addition, in its replies to this inquiry, the Commission explained that while the initial grant agreement amount for monitoring was not broken down by activities, it had foreseen ‘*independent*’ controls’ by the UNHCR and the Croatian Law Centre.

25. From 2018 onwards therefore, in various public statements related to the emergency assistance grants to Croatia, the Commission stated that a “monitoring mechanism” would be put in place. It was only in 2021 that an independent mechanism was set up with the use of EU funds. This created confusion about the EU’s role in monitoring fundamental rights compliance in relation to border operations carried out by the Croatian authorities with the support of EU funds.

26. The Commission has now clarified that the monitoring mechanism established in summer 2021 is covered by the latest emergency assistance grant. The Ombudsman therefore does not consider it useful to make a recommendation on this matter. She will, however, make a suggestion for improvement concerning the transparency around the newly established mechanism.

27. The Ombudsman also expects that the Commission will monitor whether the mechanism is indeed independent and effective in ensuring compliance with fundamental rights and EU law.



[18] The Ombudsman will make corresponding suggestions for improvement.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following finding:

The Ombudsman identified significant shortcomings in the context of the emergency funding for border management activities in Croatia, notably as regards how fundamental rights compliance was monitored and how the Commission communicated about the monitoring activities. As the Commission has taken steps to address these shortcomings, no further inquiries are justified.

The complainant and the Commission will be informed of this decision .

Suggestions for improvement

The Ombudsman makes the following suggestions for improvement to the Commission:

- A. The Commission should provide clear and up-to-date public information on the functioning of the monitoring mechanism in Croatia.**
- B. The Commission should take an active role in overseeing the monitoring mechanism and demand concrete and verifiable information from the Croatian authorities on the steps taken to investigate reports of collective expulsions and mistreatment of migrants and asylum seekers.**
- C. The Commission should monitor whether the mechanism is indeed independent and that it is effective in ensuring compliance with fundamental rights and EU law.**
- D. The Commission should inform the Ombudsman within one year of the steps it has taken to strengthen fundamental rights compliance in Croatian border operations receiving EU funds.**

Emily O'Reilly

European Ombudsman

Strasbourg, 22/02/2022



[1] Grant agreements under ref. HOME/2017/ISFB/AG/EMAS/0076, HOME/2018/ISFB/AG/EMAS/0083 and HOME/2020/ISFB/AG/EMAS/0136

[2] According to article 14 of *Regulation (EU) No 515/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa*, funding may be granted to Member States in a situation resulting from an urgent and exceptional pressure where a large or disproportionate number of non-EU nationals are crossing or are expected to cross an external border.

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32014R0515> [Linki]

[3] *‘..The Commission has been actively supporting Croatian efforts to ensure full respect of fundamental rights at the border. In this respect, part of the EUR 6.8 million in emergency funding granted to Croatia in December 2018 to reinforce border management was dedicated to a new monitoring mechanism. This would help to ensure that border control activities by Croatian border guard officers remain fully compliant with EU law, international obligations and with the respect of fundamental rights and the rights resulting from the EU asylum acquis, including the principle of non-refoulement...’* (p. 14 of Communication from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen acquis by Croatia, COM/2019/497 final

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0497&qid=1642778172723> [Linki])

See also: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6884 [Linki] and letters by the Commission on file with the Ombudsman of 5 June 2019, 9 January 2020 and 14 February 2020

[4] See, amongst others:

<https://www.ombudsman.hr/en/download/report-on-the-performance-of-the-activities-of-the-national-preventive-mechanism> [Linki], pp. 25-33

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25976> [Linki]

<https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a0ee5e> [Linki], with further references

<https://www.unhcr.org/desperatejournneys/> [Linki], with further references

[5] <https://www.ombudsman.europa.eu/en/doc/correspondence/en/141110> [Linki]



[6] <https://www.ombudsman.europa.eu/en/doc/correspondence/en/134843> [Linki]

[7] <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/148061> [Linki]

[8] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6884 [Linki]

[9] As part of the Tripartite Protocol between the UN High Commissioner for Refugees, the Croatian Law Centre and the Croatian Ministry of Interior.

[10] The Croatian Law Centre is a non-governmental organisation working on human rights: <http://www.hpc.hr> [Linki].

[11]

<https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area/schengen-evaluation-and-monitoring> [Linki]

[12] Regulation (EU) No 515/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa:
<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32014R0515> [Linki]

[13] See Article 3(4) of Regulation 515/2014.

[14] <https://www.ombudsman.europa.eu/en/decision/en/59836> [Linki]

[15] The Ombudsman inspected the grant documents, which the Commission classified as confidential.

[16] Sub-action 5 of the 2017 grant agreement - 'Technical Monitoring border control activities'.

[17] Protocol was signed on 14 March 2019 by the Croatian Ministry of Interior, the UNHCR and the Croatian Law Centre

[18] Stakeholders, including the complainant, have raised concerns that the proposed solutions fall short of key standards for a mechanism to be considered independent and effective:

<https://www.amnesty.org/en/wp-content/uploads/2021/08/EUR6445462021ENGLISH.pdf> [Linki]